Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In Re:	)	
Determination of Statutory License Terms And Rates for New Subscription Digital Audio Services	)	Docket No. 2001-2 CARP DTNSRA
Adjustment of Rates and Terms for the Digital Performance of Sound Recordings	)	Docket No. 2001-1 CARP DSTRA 2

JOINT OPPOSITION
TO
REQUEST FOR CONSOLIDATION

The Recording Industry Association of America, Inc. ("RIAA"), on behalf of itself and SoundExchange, an unincorporated division of the RIAA, the American Federation of Television and Radio Artists and the American Federation of Musicians of the United States and Canada (collectively, "Copyright Owners and Performers") submit the following opposition to the Petition to Convene Copyright Arbitration Royalty Panel and to Consolidate Proceedings filed by Music Choice (dated October 11, 2001) ("Music Choice Petition").

BACKGROUND

Section 114 of the Copyright Act, 17 U.S.C. § 114, establishes four distinct categories of digital transmissions that may be made pursuant to statutory license: (1) non-exempt, eligible nonsubscription transmissions; (2) transmissions made by preexisting subscription services; (3) transmissions made by preexisting satellite digital audio radio services; and (4) transmissions made by new subscription services. For each

category of transmissions, reasonable rates and terms are determined either through voluntary negotiations or, if such negotiations are unsuccessful, through compulsory arbitration proceedings conducted by a Copyright Arbitration Royalty Panel ("CARP"). Section 114(f), 17 U.S.C. § 114(f), together with Chapter 8 of the Copyright Act, 17 U.S.C. § 801 *et seq.*, sets forth the procedures for requesting, convening and conducting a CARP proceeding.

According to the statutory scheme established in Section 114(f), rates for transmissions made by preexisting subscription services and preexisting satellite digital audio radio services are to be established using the four policy objectives set forth in Section 801(b)(1). See 17 U.S.C. § 114(f)(1)(B). Once established, such rates are to be adjusted at five (5)-year intervals in a CARP proceeding absent agreement of the interested parties. See 17 U.S.C. § 114(f)(1)(C). In marked contrast, rates for transmissions made by non-exempt, eligible nonsubscription transmissions and new subscription services are to be established using the "willing buyer/willing seller" standard that was adopted in 1998 with the passage of the Digital Millennium Copyright Act ("DMCA"). Pub. L. No.105-304, 112 Stat. 2890 (1998); see also 17 U.S.C. § 114(f)(2)(B). Once established, the rates for non-exempt, eligible nonsubscription transmissions and new subscription services are to be adjusted at two (2)-year intervals in a CARP proceeding absent agreement of the interested parties. See 17 U.S.C. § 114(f)(2)(C).

To date, two separate CARPs have been convened with respect to the Section 114 statutory license. The first CARP, which issued its report in 1997 (the "1997 CARP"), established rates and terms for preexisting subscription services for the period 1996

through 2000. See Report of the Copyright Arbitration Royalty Panel in Docket No. 96-5 DSTRA ("1997 CARP Report"). These rates and terms were extended through 2001 as part of the DMCA. The second CARP, Docket No. 2000-9 CARP DTRA 1 & 2, was convened in July 2001 and is still in the process of determining rates and terms for non-exempt, eligible nonsubscription transmissions for the periods 1998-2000 and 2001-2002 (the "Webcasting CARP"). No CARP has yet addressed the rate(s) to be paid for transmissions made either by preexisting satellite digital audio radio services or by new subscription services.

Pursuant to Section 114(f), petitions have been filed by interested parties requesting the Copyright Office to convene two CARPs – one to establish rates and terms for the statutory license for transmissions made by preexisting subscription services and preexisting satellite digital audio radio services, Docket No. 2001-1 CARP DSTRA 2, and one to establish rates and terms for the statutory license for transmissions made by new subscription services, Docket No. 2001-2 CARP DTNSRA. Music Choice is now seeking to consolidate these two proceedings apparently for its own convenience.

As described above, the two proceedings Music Choice seeks to consolidate are governed by sharply different legal standards and are subject to rate adjustments at different intervals of time. See 17 U.S.C. §§ 114(f)(1)(B) and (C), 114(f)(2)(B) and (C). The proceedings will also involve two (arguably, three) types of services operating under very different sets of circumstances. The two types of pre-existing services have, by definition, been in existence since sometime prior to July 31, 1998. The new subscription services were not launched until sometime after that date – March 2000 in the case of Music Choice's new subscription service identified as "Backstage Pass."

The two types of preexisting services and the new subscription services also operate in very different media. All three preexisting subscription services make their transmissions via cable or satellite providers as part of television programming packages. The two preexisting satellite digital audio radio services make their transmissions directly to consumers solely via satellite to dedicated equipment such as automobile receivers. Copyright Owners and Performers reasonably believe that all of the new subscription services – including Music Choice's Backstage Pass service – make their transmissions directly to consumers via the Internet. The economics and marketplace for these businesses are each very different, including the cost structures, revenue opportunities and competition. The technologies and options they afford the listeners who receive the audio programming also differ. As a consequence, the evidence that each of these services would find it necessary to present in a CARP proceeding would be extremely different.

For the various reasons discussed above, consolidation of these two proceedings would be akin to consolidation of a Section 111 cable rate adjustment proceeding with a Section 119 satellite rate adjustment proceeding, something the Copyright Office has never done, for good reason. Although there is overlap between the parties to those proceedings and the types of copyrighted programming at issue, the vastly different rate-setting standards and statutory license intervals like those in Section 114 would make such consolidation unworkable. Compare 17 U.S.C. § 801(b)(2) (Section 111 standard) with 17 U.S.C. § 119(c)(3)(D) (Section 119 standard). Similar divisions exist between the new subscription service and preexisting subscription service statutory licenses, notwithstanding the fact that they appear in the same section of the Copyright Act.

For all of these reasons, Copyright Owners and Performers believe that consolidation of the upcoming proceedings will substantially increase the complexity of the proceedings and cause confusion and prejudice without offering any offsetting efficiencies or cost savings. Copyright Owners and Performers, therefore, urge the Copyright Office to reject Music Choice's request for consolidation.

ARGUMENT

I. MUSIC CHOICE OFFERS NO REAL SUPPORT FOR ITS REQUEST FOR CONSOLIDATION

The Music Choice Petition devotes only a single, perfunctory sentence to its request for consolidation: "Good cause exists to consolidate the two proceedings in the interest of fairness and efficiency." Music Choice cites no basis for its conclusion that "fairness and efficiency" favor consolidation nor does it anticipate or address the myriad legal and evidentiary problems that would result if its request were granted.

As the only support for its position, Music Choice cites a footnote that was included in a Copyright Office Order issued in the Webcasting CARP, a footnote that seems far more concerned with matters of timing than with matters of substance. According to the Order: "If Music Choice files a petition pursuant to section 114(f)(2)(C)(i)(I) promptly, it will be possible to establish the six month voluntary negotiation period to run concurrently, or nearly concurrently, with the voluntary negotiation period for preexisting subscription services for the 2001-2005 period, and if those negotiations are not successful, it *may* be possible to consolidate the CARP proceedings for preexisting and new subscription services." See Digital Performance

Right in Sound Recordings and Ephemeral Recording Rate Adjustment Proceeding, 2000-9 CARP DTRA 1 & 2 at 5, n.4 (Order dated January 2, 2001)(emphasis added).

The above suggestion, buried in a footnote in an order issued in an unrelated proceeding, can hardly be interpreted – as Music Choice would have it – as a determination by the Copyright Office that the two proceedings at issue here should be consolidated. There is no indication that the Copyright Office considered the problems associated with consolidating the two proceedings.

II. BECAUSE THE TWO PROCEEDINGS ARE GOVERNED BY SHARPLY DIFFERENT LEGAL STANDARDS, CONSOLIDATION WOULD AFFECT THE COPYRIGHT OWNERS' AND PERFORMERS' SUBSTANTIVE RIGHTS AND SUBSTANTIALLY PREJUDICE THEM

The two proceedings Music Choice seeks to consolidate are governed by sharply different legal standards. These differences, which are set forth in the express language of the statute, see 17 U.S.C. §§ 114(f)(1)(B) and (2)(B), were recently summarized by the Copyright Office:

> Section 114 of the Copyright Act contains two separate and distinct standards for setting rates and terms for the statutory license under which transmissions of sound recordings are made by means of digital audio transmissions. See, 17 U.S.C. 114(f)(1)(B) and (2)(B). Rates and terms for transmissions made by preexisting subscription services and preexisting satellite digital audio radio services are set to achieve four objectives set forth in section 801(b)(1). *These rates need not necessarily be what a willing buyer and a willing seller would negotiate in an arms-length voluntary transaction.* See, 63 FR 25394, 25399 (May 8, 1998); Recording Industry Association of Am., Inc. v. Librarian of Congress, 176 F.3d 528, 533 (D.C. Cir. 1999).
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> The second standard for setting rates and terms was added to section 114 in 1998 when Congress expanded the statutory license to include transmissions made by non-interactive, nonsubscription services. It says that '[i]n establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the copyright arbitration royalty panel shall establish rates and terms that most clearly

> represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.' 17 U.S.C. 114(f)(2)(B).

Digital Performance Right in Sound Recordings and Ephemeral Recording Rate Adjustment Proceeding, 2000-9 CARP DTRA 1 & 2 at 1-2 (Order dated July 16, 2001)(emphasis added).

As the Copyright Office made clear in the above-cited Order, the differences in the applicable legal standards are substantive, not merely semantic. Indeed, when rates and terms were determined for the preexisting subscription services in 1997 under the Section 801(b)(1) standard, the panel did not attempt to establish "marketplace" rates and terms. Rather, the 1997 CARP set rates and terms based upon factors such as the financial vulnerability of the subscription services, the need to keep such services in business, the ability of future CARP proceedings to readjust rates, the promotional value of the services, and the risk such services had undertaken. See 1997 CARP Report at ¶¶ 198-201. As a result, the 1997 CARP set a "low" rate applicable to preexisting subscription services rather than a fair market value rate that would have been negotiated in a free market between a willing buyer and a willing seller. Id. ¶ 198. The 1997 CARP's reasoning for establishing a rate that did not replicate what would occur in a free market was upheld by the Copyright Office, see *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 Fed. Reg. 25394, 25399 (May 8, 1998), and by the D.C. Circuit. See *Recording Industry Association of Am., Inc. v. Librarian of Congress*, 176 F.3d 528, 533 (D.C. Cir. 1999).

In contrast to the factors that the 1997 CARP relied on to arrive at a below-market rate, the DMCA amendments to Section 114 direct a panel to establish rates for new

subscription services (and for non-exempt, eligible nonsubscription services) under the "willing buyer/willing seller" standard. See 17 U.S.C. § 114(f)(2)(B) ("In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.")

Copyright Owners and Performers believe that all of the parties' right to have the evidence for each type of service considered under the appropriate legal standard will be seriously compromised if a single panel is required to hear evidence concerning two/three distinct types of services and then apply two sharply different legal standards to arrive at rates and terms for such services. Even if it is intellectually possible for a panel to apply properly two different legal standards to evidence presented to them in a single proceeding, Copyright Owners and Performers believe that, as a practical matter, arbitrators presiding over a consolidated proceeding would have a difficult time preventing the evidence submitted under one standard from affecting the rates to be established under the other standard. Moreover, the difficulty of applying the two different legal standards in one proceeding would create confusion and likely give rise to multiple objections by the parties as to whether particular evidence was relevant under a particular standard.

Where, as here, consolidation could affect the substantive rights of the parties and cause them prejudice, the Copyright Office should not exercise its consolidation authority. Cf. Digital Performance Right in Sound Recordings and Ephemeral Recording Rate Adjustment Proceeding, 2000-9 CARP DTRA 1 & 2 at 5 (Consolidation Order

dated December 4, 2000)("[C]onsolidation will not affect the substantive rights of the parties to present their evidence for both time periods, nor will it cause them prejudice."); Id. at 3 (granting consolidation of the Webcasting CARPs for 1998-2000 and 2001-2002 on the grounds that consolidation was "purely a procedural matter.")

As noted above, what Music Choice has proposed with respect to consolidation would be akin to consolidating proceedings for establishing royalty rates for cable systems under Section 111 and satellite services under Section 119 because both services delivered over-the-air broadcast station signals to subscribers. The mere fact that the two statutory licenses for subscription audio services at issue here appear in the same section of the Copyright Act should not lead the Office to minimize and confuse through consolidation the clear distinctions between the legal and factual circumstances involved with each.

III. THE DIFFERENT RATE ADJUSTMENT INTERVALS WILL ADD FURTHER CONFUSION TO A CONSOLIDATED PROCEEDING

According to Section 114, the rate(s) for transmissions made by preexisting subscription services and preexisting satellite digital audio radio services are required to be adjusted at five (5)-year intervals in a CARP proceeding absent agreement of the interested parties. See 17 U.S.C. § 114(f)(1)(C). By contrast, the rates for transmissions made by new subscription (and by non-exempt, eligible nonsubscription services) are required to be adjusted at two (2)-year intervals in a CARP proceeding absent agreement of the interested parties. See 17 U.S.C. § 114(f)(2)(C). While at first blush this disparity does not appear particularly relevant to the initial rate setting proceedings at issue here, it

becomes clear upon closer inspection that the different adjustment intervals would add another layer of confusion and complexity to a consolidated proceeding.

The Copyright Office has not yet announced which time periods the new subscription services proceeding will cover. According to the statute, however, a CARP will be required to set an initial rate for any portion of the 1998-2000 period during which any new subscription service was operating[1], which rate will then have to be adjusted for the period 2001-2002 and for each two (2)-year period thereafter. The CARP that hears evidence concerning the preexisting subscription services and preexisting satellite digital audio radio services, on the other hand, will have two rate-setting tasks before it: (1) to adjust the rate for the preexisting subscription services that was initially set in the 1997 CARP for the period 2001-2005; and (2) to set an initial rate for preexisting satellite digital audio radio services for any portion of the period from 1996-2001 during which any such service was operating[2] and to adjust that rate for the period 2001-2005. Requiring arbitrators to receive evidence for these multiple time periods would add further confusion and complexity to a consolidated proceeding that would already be complicated by the statutory requirement to apply two different legal standards.

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[1] Copyright Owners and Performers understand that Music Choice has been operating a new subscription service since at least as early as March 2000. It is unclear whether there are other new subscription services that predate it.

[2] Copyright Owners and Performers understand that XM Radio launched its service in late 2001.

IV. CONSOLIDATION WILL NOT LEAD TO ANY INCREASED EFFICIENCY; IT WILL MERELY CAUSE INCREASED COMPLEXITY AND CONFUSION

In the Webcasting CARP, the Copyright Office decided to consolidate the 1998-2000 and 2001-2002 proceedings after determining that "[c]onsolidation will avoid duplication of evidence, reduce the overall cost of the proceeding, and yield a timely established royalty fee for the 2001-2002 period." Digital Performance Right in Sound Recordings and Ephemeral Recording Rate Adjustment Proceeding, 2000-9 CARP DTRA 1 & 2 at 5 (Consolidation Order dated December 4, 2000). Consolidation of the two proceedings at issue here will have just the opposite effect.

The preexisting subscription services/preexisting satellite digital audio radio services proceeding has only five (5) parties: AEI Music/DMX Music, Inc.; Muzak LLC; Music Choice; XM Satellite Radio, Inc.; and Sirius Satellite Radio, Inc. (collectively, the "Preexisting Services").[3] Other than Music Choice, to the best of Copyright Owners' and Performers' knowledge, none of the Preexisting Services presently offers a new subscription service. As a result, there will be no overlap – other than Music Choice – in the services involved in the two proceedings and there should be very little overlap in the evidence presented in the two proceedings. It is doubtful that even Music Choice will submit duplicative evidence given the fact that a different type of service is at issue in each proceeding.

More lack of overlap can be found by examining the media in which the various services operate. All three of the preexisting subscription services make digital audio transmissions available to the public via cable or satellite, or both, via intermediaries who

offer their programming as part of larger television programming packages. Each of the preexisting satellite digital audio radio services makes digital audio transmissions available to the public solely via satellite to dedicated equipment such as automobile receivers. These two services – XM Satellite Radio and Sirius Satellite Radio – share a duopoly of FCC licenses granted for such services, which ensures that there will be no new subscription services offering satellite digital audio radio services.

By contrast, Copyright Owners and Performers reasonably believe that all services intending to participate in the new subscription services proceeding offer their services directly to listeners' general purpose computers via the Internet. Even Music Choice's new subscription service, Backstage Pass, makes digital audio transmissions via the Internet. See Music Choice Petition at 1.

These differences in delivery media and the evidence required for differentiating the rates and terms that should apply to such media will lead to further confusion, not efficiency, if the two proceedings were consolidated. In order to render a decision, the arbitrators will be forced to sort through testimony and evidence and develop a working understanding of not one or two but three separate music delivery models. Such evidence will be additive, not overlapping, and consolidating the proceedings will do nothing to streamline the evidence or eliminate any perceived duplication of evidence.

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[3] Because these parties all had to be in existence as of July 31, 1998, this list cannot be expanded absent congressional action.

CONCLUSION

In the Webcasting CARP, the Copyright Office made clear that "[i]f, in the view of the Library, a consolidated proceeding will be so complicated and involve significantly larger amounts of testimony and evidence than a single proceeding, then consolidation is not an option." Digital Performance Right in Sound Recordings and Ephemeral Recording Rate Adjustment Proceeding, 2000-9 CARP DTRA 1 & 2 at 4 (Consolidation Order dated December 4, 2000). Given the different legal standards, the different rate adjustment intervals, the lack of overlap among the parties to the proceedings, the different delivery models and the different economic and marketplace conditions under which the various services covered by these proceedings operate, this is precisely the result that would occur if the Music Choice request were granted.

For the reasons stated above, Copyright Owners and Performers respectfully request that the Copyright Office deny Music Choice's request for consolidation. Copyright Owners and Performers further request that the Copyright Office set the dates for filing direct cases in the two proceedings currently pending before the Copyright Office.

Respectfully submitted,

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

By: Ann Chaitovitz /acm
Ann Chaitovitz
AFTRA
1806 Corcoran Street, N.W.
Washington, D.C. 20009

Of Counsel:

Arthur Levine
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER
1300 I Street, N.W.
Washington, D.C. 20005

AMERICAN FEDERATION OF MUSICIANS

By: Patricia Polach /acm
Patricia Polach
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Washington, D.C. 20005

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.
on behalf of itself and SoundExchange

By: Susan Munsat
Cary H. Sherman
Steven M. Marks
Linda R. Bocchi
Susan Chertkof Munsat
Gary R. Greenstein
Recording Industry Association of America, Inc.
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 775-0101
Fax: (202) 775-7253

Of Counsel:

Robert Alan Garrett
Michele J. Woods
Jule L. Sigall
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004

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